Supreme Court, U.S.
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Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JUAN SUROS,

Petitioner,

- v.-

STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION FIRST JUDICIAL DEPARTMENT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

THEODORE S. GREEN, ESQ.
Attorney for Petitioner
GREEN & WILLSTATTER
200 Mamaroneck Avenue
White Plains, New York 10601
(914) 948-5656

6 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the excessive-fines clause of the Eighth Amendment -- as made applicable to the states through the Fourteenth Amendment -- apply to restitution or reparation awards imposed in state criminal prosecutions and, if so, what factors govern its application?

2. Does a restitution award imposed in violation of state law and which directs payment of an arbitrarily-fixed sum of money for "intangible" losses and an additional sum to purchase a new security system violate due process under the Fifth and Fourteenth Amendments?

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Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES
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JUAN SUROS,

Petitioner,

-v.-

STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

The petitioner, Juan Suros, respectfully prays that a writ of

certiorari issue to review the judgment of the Supreme Court of the State of New York, Appellate Division, in and for the First Judicial Department, entered November 3, 1994.

REPORTED OPINIONS OF STATE COURTS AND JURISDICTIONAL STATEMENT

On November 3, 1994, the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered an order affirming the judgment of conviction rendered against petitioner in the Supreme Court of the State of New York, New York County, on July 13, 1993 and also affirming an order of that same court denying his motion to set aside part of his sentence. People v. Suros, 209 A.D.2d 203, 618 N.Y.S.2d 532 (N.Y. App.

Div. 1st Dept. 1994). Leave to appeal to the New York Court of Appeals was denied by a judge of that Court on April 4, 1995. People v. Suros, 85 N.Y.2d 943 (New York 1995). The opinion and order of the sentencing court is not reported, but is produced in the Appendix hereto. Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. V:

No person shall . . . be deprived of life, liberty, or property without due process of law;

U.S. Const., Amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., Amend. XIV

Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Criminal Procedure Law §440.20, subd. 1

At anytime after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law.

New York Criminal Procedure Law §470.15. Determination of appeals by intermediate appellate court; scope of review.

1. Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal proceeding which may have adversely affected the defendant.

* * *

4. The kinds of determinations of reversal or modification deemed to be upon

the law include, but are not limited to, the following:

* * *

(c) That a sentence was unauthorized, illegally imposed or otherwise invalid as a matter of law.

New York Criminal Procedure Law §470.35. Determination by court of appeals of appeals from orders of intermediate appellate courts; scope of review.

1. Upon an appeal to the court of appeals from an order of an intermediate appellate court affirming a judgment, sentence or order of a criminal court, the court of appeals may consider and determine not only questions of law which were raised or considered upon the appeal to the intermediate appellate court, but also any question of law involving alleged error or defect in the criminal court proceedings resulting in the original criminal court judgment, sentence or order, regardless of whether such question was raised, considered or determined upon the appeal to the intermediate appellate court.

New York Penal Law §60.27 [as written at time of offense herein].

1. In addition to any of the dispositions authorized by this article, the court shall consider restitution to the victim of the crime and may require restitution as part of the sentence imposed upon a person convicted of an

offense, and after providing the district attorney with an opportunity to be heard in accordance with the provisions of this subdivision, require the defendant to make restitution of the fruits of his offense or reparation for the loss or damage caused thereby. The district attorney shall where appropriate, advise the court at the time of sentencing that the victim seeks restitution, the extent of injury or economic loss or damage of the victim, and the amount of restitution sought by the victim in accordance with his responsibilities under subdivision two of section 390.50 of the criminal procedure law and article twenty-three of the executive law. The court shall hear and consider the information presented by the district attorney in this regard.

2. Whenever the court requires restitution or reparation to b made, the court must make a finding as to the fruits of the offense or the loss or damage caused by the offense. If the record does not contain sufficient evidence to support such finding or upon request by the defendant, the court must conduct a hearing upon the issue in accordance with the procedure set forth in section 400.30 of the criminal procedure law.

STATEMENT OF THE CASE

Procedural History and Facts

Petitioner, Juan B. Suros, M.D., is a San Diego heart surgeon who in 1990 pleaded guilty in New York State Supreme Court, New York County, to the larceny of a number of rare coins from the premises of the American Numismatic Society ("ANS"), an organization of which he had once been a member and benefactor. After his arrest, all of the coins were returned.

Under the terms of the plea, Dr. Suros was required to pay restitution in the amount of $36,494.92, for actual out-of-pocket expenses which ANS claimed it had incurred as a result of the theft. In addition, he was directed to pay a "fine"

of one million dollars. Petitioner's counsel stipulated that "subject to the authority of the court" part of the fine (in an amount to be fixed by the court) would be paid directly to ANS; at the original sentence, this latter payment was not denoted restitution or reparation; rather, it was deemed part of the "fine" and was intended primarily for what the court termed "damage in reputation to that institution" and for installation of a security system.

The amount the court decided on was $160,000, of which $60,000 was intended for the new security system. ANS did not attempt to quantify the claimed damage to its reputation, claiming it was "incalculable." In addition to the monetary penalties, petitioner was

sentenced to a six-month jail term and five years' probation.

Dr. Suros paid all of the monies due ANS (i.e., the $160,000 portion of the fine earmarked to that institution plus the $36,494.92 in restitution), and was directed to pay to the New York City treasury the $840,000 balance of the fine in yearly installments. In late 1992, when the second installment was due, Dr. Suros moved to set aside the sentence pursuant to New York Criminal Procedure Law §440.20 upon the ground that the "fine" and "restitution" portions had been unlawfully imposed. In deciding the motion, the sentencing court agreed that the "fine" was unlawful because the Penal Law then limited fines to the greater of $5,000 or twice the "gain" from the

offense and here there was no gain inasmuch as all of the coins had been returned to the owner. On July 13, 1993, the court vacated the entire million-dollar fine, imposed the maximum permissible fine of $5,000 and reimposed the $160,000 portion of the original fine that had gone to ANS, this time determining it to be "restitution." Prior to imposition of this new sentence, the defense moved for a hearing to determine the amount of restitution pursuant to New York Penal Law §60.27, subd. 2. That application was denied. Leave to appeal to the Appellate Division of New York Supreme Court from the 440.20 order was granted and a consolidated appeal ensued from the resentence and the 440.20 order.

Both in his 440.20 motion and on

appeal, Dr. Suros argued that the purchase of a security system and compensation for claimed "intangible" damage were not proper subjects of restitution as defined by New York law; further, in the absence of sufficient record evidence of loss, it was error to award money to ANS without first conducting a hearing in accordance with state law. In the Appellate Division, petitioner also argued that the sentence violated both his Fifth Amendment due process right to be sentenced in accordance with law and his Eighth Amendment protection against excessive fines. [His "questions presented" to that Court included:

> Whether that portion of the original sentence which required appellant to pay $160,000 to the American Numismatic Society was neither a fine, restitution nor

> reparation and violated his due process right to be sentenced in accordance with law and the prohibition against excessive fines? PL §60.27; N.Y. Const., Art. I, §§5,6; U.S. Const., Amends. V, VIII & XIV (appellate division brief at p. 1).]

Here, petitioner was invoking the power of the state Appellate Division to review, de novo and as a "question of law[,]" any issue concerning whether a sentence is "unauthorized, illegally imposed or otherwise invalid as a matter of law." New York Criminal Procedure Law §470.15, subd. 4(c). Citing language from Browning-Ferris v. Kelco Disposal, 492 U.S. 257 (1989), petitioner contended that the restitution here was arbitrary and did not represent harm actually suffered by ANS.

The lower court and the Appellate

Division held that petitioner had consented to the amount of restitution ordered, thereby obviating a hearing to measure the amount of loss. The Appellate Division characterized his claim as addressing solely "the manner in which the amount of restitution was determined" and held that such error could be and had been waived, citing People v. Callahan, 80 N.Y.2d 273, 281 (1992). It held that the record disclosed a sufficient basis for the award, based on information in letters submitted by ANS, petitioner's consent and his expertise in numismatics, which "provided him with an unparalleled understanding of the 'tangible and intangible' damages which resulted from his theft of numerous coins from his victim." The Appellate Division did not

address the propriety of requiring petitioner to pay for installation of a security system, nor did it address petitioner's Eighth Amendment claim.

REASONS FOR GRANTING THE WRIT

In recent years, this Court has addressed the reach of the Eighth Amendment's "excessive fines" clause. It has found it applicable to forfeitures, Austin v. United States, 113 S.Ct. 2801 (1993); Alexander v. United States, 113 S.Ct. 2766 (1993), but inapplicable to punitive damages in civil cases involving private parties, Browning-Ferris v. Kelco Disposal, 492 U.S. 257 (1989).

This case presents a different issue: Does the excessive-fines clause apply to restitution or reparation ordered in

criminal cases and what factors define its boundaries? It also presents the antecedent question -- expressly left open in Browning-Ferris -- of whether "the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment[.]" Browning-Ferris, supra, 492 U.S. at 276, n. 22.

This Court has recognized the Eighth Amendment as a buffer against "the potential for governmental abuse of its 'prosecutorial' power[.]" Browning-Ferris v. Kelco Disposal, supra, 492 U.S. at 266. It has also been suggested that the Amendment may find its origins in Magna Carta, which sought "to reduce arbitrary royal power" in imposing monetary penalties. Id. at 270-271.

It has been suggested that the "excessiveness" inquiry may depend on the particular nature of the monetary penalty being considered. A simple punitive fine might be subject to a proportionality inquiry: i.e., the "value of the fine in relation to the offense[,]" Austin v. United States, supra, 113 S.Ct. at 2814-2815 (Scalia, J., concurring), whereas the question in forfeiture cases might be "not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense." Id. at 2815 [emphasis in original].

A restitution or reparation order also implicates discrete issues -- and ones which are well-defined in the present case. For one thing, a court's decision

to direct a criminal defendant to pay money as compensation for harm caused can quickly devolve into a hopelessly arbitrary exercise unless some limit on the meaning of restitution is observed. Affluent defendants are particularly vulnerable because the state can force such defendants to choose between surrendering their property or their liberty.

New York law limits restitution to "economic loss or damage to the victim" (New York Penal Law §60.27, subd. 1), a term generally understood to mean "pecuniary loss" or "out-of-pocket damages[.]" See e.g., New York Penal Law §165.00; McKinney's Cons. Laws of NY, Book 7B, Practice Commentaries to CPLR 4545, pp. 345-346 (1992 ed.); New York

Insurance Law §5102, subsecs. (a) and (c). Restitution or reparation is only permitted for losses which can be quantified as an "amount", and this "amount" must be susceptible of measurement by a preponderance of the evidence. New York Penal Law §60.27, subds. 1 and 5(a); New York Criminal Procedure Law §400.30, subds. 1 and 4.

In the present case, the court ignored these statutory principles and determined that it would require restitution for the numismatic society's claimed "intangible" damage to its reputation. It then picked a round number -- $100,000 -- as the amount of the award. However, the court's action implicates more than just a violation of state law. By selecting a number that had no

evidentiary foundation, the court wielded its power to extract a monetary penalty in the arbitrary manner that the Eighth Amendment proscribes.

The arbitrary nature of this "restitution" award is best understood by recalling that at the original sentence it was not even denoted restitution but, more nebulously, "damages" and was made part of the original million-dollar fine. [The true "restitution" -- i.e., the actual out-of-pocket losses that ANS attributed to the theft -- was fixed at the lower and more refined figure of $36,494.92, which petitioner paid separately.] The parties left it to the court -- subject to its "authority" -- to determine what portion of this "fine" should be paid to the Society as "damages." In the absence of

an evidentiary yardstick, the court could have picked any number, ranging from $1 to $999,999. Accordingly, it was equally arbitrary for the court to later determine that the part of the fine destined for the city treasury was illegal, while upholding the portion of the fine doled out to ANS. In effect, the amount of the illegal fine that petitioner was relieved of paying hinged on the number the court chose to give to ANS. The approach sanctioned by the state courts here is fraught with the potential for abuse and warrants careful scrutiny.

An equally important factor applicable to the constitutional inquiry here concerns whether and to what extent a restitution award must relate to the harm actually caused by the offense. This

Court has addressed this issue in the non-constitutional arena, narrowly construing the federal Victim and Witness Protection Act to permit restitution only as to the offense of conviction. Hughey v. United States, 495 U.S. 411 (1990). The broader constitutional question here is whether the Eighth Amendment prohibits as "excessive" a restitution award which patently represents neither loss nor damage caused by the offense. For example, in the present case, Dr. Suros was required to pay $60,000 for a new security system. Yet, Dr. Suros did not steal or damage a security system -- nor was its installation a legal obligation incurred as a result of the theft. This carries the concept of restitution too far and into an area that invites governmental

abuse.

Due Process Violation

The due process clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment, forbids the imposition of sentences which are unauthorized by law. Ex Parte Lange, 85 U.S. (19 Wall.) 163, 21 L.Ed. 872 (1874); United States v. DiFrancesco, 449 U.S. 117, 139 (1980). The Court is presented with an important constitutional issue, likely to reoccur unless addressed: whether a defendant's right to be sentenced in accordance with law may be waived. Such waivers should not be permitted because they invite abuses of a state's prosecutorial powers, particularly in extracting large monetary penalties from defendants who can afford to pay

them. For example, petitioner was required to pay $60,000 to fund a security system, which was clearly not restitution or reparation under New York law and only served to enrich ANS at Dr. Suros' expense.

No Procedural Bar

Further, the Appellate Division's determination that petitioner's claims were waived by his "consent," presents no bar to review here. Under New York law, a claim that a sentence is illegal is not waivable, even by negotiated plea, and is subject to collateral attack at any time or review in the first instance on appeal. New York Criminal Procedure Law §§440.20, 470.15, subd. 4(c). New York law requires a restitution hearing -- even when the award is agreed to as part of a negotiated

guilty plea -- on request of the defendant or when, as here, the record fails to disclose a sufficient evidentiary basis for an award. New York Penal Law §60.27, subd. 2. Further, petitioner, at the original sentence, only agreed to pay restitution "subject to the authority of the court" and, after the illegal fine was vacated at the resentence, he unsuccessfully moved for a restitution hearing before the court reimposed part of the fine as restitution.

The New York Court of Appeals recognizes a limited theory of waiver in restitution cases where the claimed illegality is not as to the amount or nature of the restitution but the procedures employed in fixing the award. People v. Callahan, 80 N.Y.2d 273 (New

York 1992). Here, however, the Appellate Division side-stepped the fact that petitioner was complaining not simply about procedures but about the legality of the restitution itself. These errors implicated "the very power of the court" to punish, People v. Callahan, supra, 80 N.Y.2d at 281, and violated petitioner's fundamental right to be sentenced in accordance with law. People v. Fuller, 57 N.Y.2d 152, 156 (1982); N.Y. Const., Art. I, §6; U.S. Const., Amend. V. Under state and federal due process, a defendant "may not receive a greater sentence than the legislature has authorized." United States v. DiFrancesco, supra, 449 U.S. at 139; citing Ex Parte Lange, supra, 85 U.S. (19 Wall.) 163.

Further, the Appellate Division's

attempt to pigeon-hole this case into Callahan's narrow waiver doctrine obscures the fact that its decision was truly adventurous: our research has disclosed no prior state appellate decision which authorized as "restitution" the funding of a new security system for a crime victim, where the defendant was not alleged to have stolen or damaged such system. Further, the Suros case is, to our knowledge, the only appellate authority in this state which has permitted restitution for "intangible" damages.

Clearly, then, the procedural waiver asserted by the Appellate Division is not "adequate" because it runs contrary to New York law as established by its highest court. Nor is the "waiver" claim "independent" of the federal question

inasmuch as it rests on the assumption that restitution for a security system and "intangible" losses can pass constitutional muster.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

THEODORE S. GREEN, ESQ.
Attorney for Petitioner
Suite 503
200 Mamaroneck Avenue
White Plains, New York
10601
(914) 948-5656

Dated: June 30, 1995

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. CARMEN BEAUCHAMP CIPARICK

Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JUAN SUROS,

Appellant.

CERTIFICATE DENYING LEAVE

I, CARMEN BEAUCHAMP CIPARICK, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon the application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,*

there is no question of law presented which ought to be reviewed by the Court of Appeals and permission is hereby denied.

Dated at New York, New York

April 4, 1995

CARMEN BEAUCHAMP CIPARICK

Associate Judge

* Description of Order: Order of the Appellate Division, First Department, entered November 3, 1994, modifying a judgment of the Supreme Court, New York county, rendered July 13, 1993.

Ellerin, J.P., Rubin, Nardelli, Williams, JJ.

52999

The People of the State of New York,

Respondent,

-against-

Juan Suros,

Defendant.

Judgment, Supreme Court, New York County (Richard Lowe III J.), rendered July 13, 1993, resentencing defendant to time served, 5 years probation, 1000 hours of community service, $5,000 fine and payment of $196,494.92 as restitution, upon his plea of guilty, of grand larceny in the third degree; and order, same court, entered on or about April 1993, denying, in part, defendant's motion to

vacate the restitution and fine imposed, unanimously modified, on the law and the facts, to the extent of vacating the imposition of community service and remanding the matter to Supreme Court for resentencing and otherwise affirmed.

Defendant's complaint regarding the manner in which the amount of restitution was determined has not been preserved for review (People v. Callahan, 80 NY2d 273, 281), and we decline to reach it in the interest of justice. In any event, we would find that since both defendant and his counsel consented to the restitution ordered, the court did not err in refusing to conduct a hearing pursuant to Penal Law §60.27(2), or in relying upon figures recited n two letters from the victim (People v. Lugo, 191 AD2d 648).

Defendant's extensive experience in numismatics, and his position as a generous benefactor of his victim, provided him with an unparalleled understanding of the "tangible and intangible" damages which resulted from his theft of numerous coins from his victim.

As the People concede, defendant was improperly sentenced to community service. Since defendant's consent could not be inferred from earlier plea negotiations, and the court's authority was limited to resentencing him only with respect to the fine which it had imposed (People v. Yannicelli, 40 NY2d 598, 602), the matter is remanded to the Supreme Court for resentencing.

APP.6

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 3, 1994

CATHERINE O'HAGAN WOLFE
CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 64

THE PEOPLE OF THE STATE OF NEW YORK, :

-against- :

JUAN SUROS, :

Defendant. :

DECISION AND ORDER IND. NO. 7976/89

RICHARD B. LOWE III, J.:

On November 27, 1990, the defendant pled guilty to grand larceny in the third degree (Penal Law §155.35). The defendant has moved pursuant to CPL 44.20 to set aside the sentence on the ground that portions of the sentence imposed were invalid or illegal.

FACTUAL BACKGROUND

On April 15, 1989, the defendant was arrested and charged in a felony complaint

with grand larceny in the second degree (Penal Law §155.40[1]). It was alleged that the defendant, a California heart surgeon and avid coin collector, stole approximately 83 coins, with a total appraised value in excess of $1,000,000, from the American Numismatic Society (hereinafter "ANS"). The defendant was subsequently indicted for grand larceny in the first degree (Penal Law §155.452) and criminal possession of stolen property in the first degree (Penal Law §165.52).

After extensive plea negotiations and the preparation of a prepleading investigation report, the parties arrived at a disposition. the defendant pled guilty to grand larceny in the third degree. The defendant was sentenced to a period of incarceration of six months and

the remainder of five years on probation. The defendant's prison sentence was to be served in a California jail and his probation supervised by the California Department of Probation. In addition, the defendant was to pay a total of $1,036,494.92. Of that sum, $36,494.92 was to be paid to the ANS for out-of-pocket expenses incurred in connection with the investigation and prosecution of this matter. An additional $160,000 was to be paid to the ANS for the installation of a security system and for other damages incurred as a result of the defendant's conduct. The remainder, $840,000, was to be paid to the City of new York through the Department of probation in a payment schedule set forth at the sentencing.

The defendant has completed his six-

month sentence of incarceration and has paid to the ANS the full amount imposed at sentence - $196,494.92. The defendant has also paid to the City of New York $40,000, the initial installment of $840,000 payment.

On December 23, 1992, several days prior to the date the defendant was required to pay $200,00 as the second installment of the $840,000 payment to the City, the defendant filed the instant motion claiming that portions of his sentence were illegal.

The defense asserts that the $840,000 payment to the City, which the defense characterizes as a fine, was illegal since the maximum fine for a felony is either $5000 or twice the amount of defendant's "gain" as that term is defined in Penal

Law §80.00(2). It is the defendant's position that since "gain" is defined as the value of the property stolen less the value of that which was recovered, there was no "gain" in this case at all since all of the stolen coins were recovered and returned to the ANS. The defendant seeks an order remitting the fine imposed upon the defendant to the extent that it exceeds $5000.

The defendant additionally contends that the payment of $196,494.92 to the ANS was improperly imposed because the court failed to hold a hearing pursuant to CPL 400.30 and Penal Law §60.27(2) to determine the appropriate amount of restitution and reparation.

Finally, the defense maintains that should the court grant the defendant's

motion to set aside the sentence, the court is prohibited under CPL 430.10 from resentencing the defendant to any additional incarceration.

$840,000 Payment

Penal law §80.00(1) provides that the maximum fine a defendant convicted of a felony (not involving narcotics) may be sentenced to is either $5,000 or twice the amount of the defendant's gain from the commission of the crime. The People concede that in this case the defendant did not realize any gain as a result of his theft of the coins since those coins were ultimately recovered and returned to the ANS. The People also concede that in this case the defendant could not have lawfully been sentenced to a fine of

$840,000.

The People maintain, however, that the sentence of the $840,000 payment was lawful. The People assert that both the defense and the court at the defendant's sentencing proceeding mischaracterized this payment as a fine. The People contend that the court merely misspoke at the defendant's sentencing when referring to the total $1,000,000 payment as a fine and has the inherent power to correct its own error. It is the People's position that the court was authorized to sentence the defendant to this payment, not as a fine, but rather as a condition of his rehabilitation.

After a careful review of the relevant statutes and case law, the court finds that the $840,000 payment, whether

termed a fine or other condition of probation, was unauthorized by law. All parties are in agreement that the order directing the defendant to pay $840,000 to the City exceeded the scope of §80.00 of the Penal Law and therefore this payment cannot be considered a lawfully imposed fine. Moreover, the courts have consistently held that a defendant may not be sentenced to a monetary payment unless such payment constitutes a fine, restitution or reparation. For example, in People v. Appel, 141 AD2d 374 (1st Dept. 1986), the court held that a sentence ordering the defendant to make a $1,000 donation to a shelter for battered women was unauthorized by law as the shelter was not itself the victim of the defendant's assaultive behavior and the

mandated payment could not be upheld as either a fine, restitution or reparation. Similar results were reached by the courts in People v. White, 119 AD2d 708 (2d Dept. 1986) (sentence directing the defendant to pay the sum of $5,000 to the Widows and Orphans Fund of the Patrolmen's Benevolent Association as a condition of probation was not authorized under Penal law §65.10); People v. Rowe, 152 AD2d 907 (4th Dept. 1989), aff'd 75 NY2d 948 (1990) (defendant was improperly sentenced to make restitution to the Rochester Police Department for unrecovered drug "buy" money expended by the police in effecting the defendant's arrest); People v. Palmeri, ___AD2d___, (4th Dept. 1992), 588 NYS2d 227 (no statutory authority for sentence directing the defendant to repay

the fees of assigned counsel as a condition of probation); People v. Dulanski, 175 AD2d 672 (4th Dept. 1991) (court did not have the authority to sentence the defendant to reimburse a public law enforcement agency for expenses incurred in extraditing the defendant from California); People v. Purcell, 161 AD2d 812 (2d Dept. 1990) (sentence directing the defendant to pay $3150 to Orange County for costs incurred in the investigation and prosecution of his case was unauthorized by statute and vacated).

In sum, the court has found no authority to justify the imposition of the $840,000 payment as a condition of the defendant's probation nor has any such authority been furnished to the court by the prosecution. The court is therefore

constrained to grant the defendant's motion to set aside that portion of the defendant's sentence directing him to pay the City of New York $840,000.

$196,494.92 Payment to the ANS

Penal Law §60.27(2) as it existed at the time of the sentence in this case provided:

> Whenever the court requires restitution or reparation to be made, the court must make a finding as to the fruits of the offense or the loss or damage caused by the offense. If the record does not contain sufficient evidence to support such finding, or upon request by the defendant,, the court must conduct a hearing upon the issue in accordance with the procedure set forth in section 400.30 of the criminal procedure law.

In this case the defendant did not request that a hearing be held to determine the amount of restitution to be

paid to the ANS and no such hearing was held. It is true, as the defense contends, that the failure of defense counsel to request a hearing on the amount of restitution does not obviate the need for the sentencing court to conduct a hearing and does not operate as a waiver of a defendant's right to such a hearing. See People v. Andrea, 141 AD2d 740, 743 (2d Dept. 1988). However, it is also well established that where a defendant expressly concedes the amount of restitution due and agrees to pay it, a hearing is unnecessary. People v. Moore, 176 AD2d 968 (2d Dept. 1991); People v. Kade, 153 AD2d 908 (2d dept. 1989); People v. Kelsky, 144 AD2d 386 (2d Dept. 1988).

The court finds sufficient support in the minutes of the defendant's sentencing

proceeding to conclude that the defendant expressly consented to the amount of restitution owing to the ANS.

At page 5 of the sentencing minutes, defense counsel states:

> Subject to the authority of this Court and the consent the consent of the defendant, defendant agrees that such amount as indicated by the Court will be payable to the American Numismatic Society on account of its loss. This amount will be stipulated by and between the People and the defendant.

Additionally, reference is made throughout the sentencing minutes that the payments of $36,494.92 and $160,000 to the ANS were to cover out-of-pocket expenses and other damages incurred by the ANS as a result of the defendant's criminal conduct (see sentencing minutes at p. 6, 15-19). The court finds that by his pleading

guilty, the defendant knowingly and voluntarily consented to pay the ANS restitution for damages in the much-negotiated and agreed upon amount of $196,494.92.

In support of his position that a hearing was necessary in this case, the defendant cites people v. Fuller, 57 NY2d 152 (1982), People v. Andrea, supra, People v. Barnes, 135 AD2d 825 (2d Dept. 1987) and People v. Sommer, 195 AD2d 1052 (4th Dept. 1984). In each of these cases, the court remanded the matter for a hearing to determine the proper amount of restitution. The court finds none of these cases are controlling under the circumstances present in this case. People v. Fuller, supra, involved a sentence where the amount of restitution

was determined by the Department of Probation. Additionally, Andrea, Barnes, and Sommer all involved cases where the defendant did not consent to and agree to pay the amount of restitution imposed.

Resentence

Penal Law §440.20(1) provides that "[a]t any time after the entry of judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law." Penal Law §440.20(4) further provides that "[a]n order setting aside a sentence pursuant to this section does not affect the validity or status of the underlying conviction, and after entering such an order the court must resentence

the defendant in accordance with the law."

It is the People's position that should the court find the sentence of the $840,000 payment invalid pursuant to CPL 440.20(4), the defendant may be resentenced up to the maximum sentence allowed by law for the crime to which the defendant pled guilty. The People maintain that in this case resentence could include a period of incarceration of 2 1/3 - 7 years.

The defendant asserts that pursuant to CPL 430.10, the court may not resentence the defendant to any additional incarceration. In support of this position, the defense cites People v. Yannicelli, 40 NY2d 598 (1976) and People v. Demanso, 145 AD2d 907 (4th Dept. 1988).

CPL 430.10 provides that "[e]xcept as

otherwise specifically authorized by law, when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed, suspended or interrupted once the term or period of the sentence has commenced."

In People v. Yannicelli, supra, each of the two defendants pled guilty to possession of gambling records in the first degree. One was sentenced to a term of imprisonment of three month and a fine of $1,000 and the other was sentenced to a term of two months and a $250 fine. On a prior appeal, the Appellate Division reversed and remanded for resentencing holding that the sentences were invalid as a matter of law because the sentencing court failed to comply with the

requirement of Penal Law §80.00 that where a fine for a felony is imposed, the court must make a finding as to the amount of the defendant's gain from the crime. On resentence, the court did not impose any fines, but resentenced the defendants, who had already served their original terms of imprisonment, to longer terms which would run concurrently and the defendants would receive credit for time served. The defendants then appealed their resentence.

The Court of Appeals in Yannicelli held that the resentence of the defendants to a longer period of incarceration was prohibited by CPL 430.10. the Court noted that since the original term of imprisonment was lawful and had been completely served prior to resentence, the court had no power to alter it by

sentencing them to a different, longer term. The Court held that resentence should be solely limited to correct the procedural defect made with respect to the imposition of the fine.

In People v. Demanso, supra, the defendant pled guilty to grand larceny in the second degree and was sentenced to a term of probation, restitution and a fine. The defendant moved to set aside his sentence pursuant to CPL 440.20 insofar as the court imposed a fine without first complying with the procedural requirements of Penal Law §80.00. The court granted the defendant's motion and vacated the sentence. Upon resentencing, the court ordered restitution and imposed a term of imprisonment.

The court in Demanso held that the

sentencing court erred in imposing a term of imprisonment upon resentencing. Citing Yannicelli, the court held that upon resentencing the court was required to reimpose the parts of the original sentence that were proper and to correct only the part of the sentence that was invalid, i.e., the imposition of the fine without first complying with Penal Law §80.00.

The court finds the instant matter to be factually and legally indistinguishable from Yannicelli and Demanso. As the defendant's original sentence of six-month imprisonment was lawful and has been completely served by the defendant, the court is prohibited under CPL 430.10 from imposing any additional incarceration.

In arguing that additional

incarceration may be imposed, the People rely on Kisloff ex. rel. Wilson v. Covington, 73 NY2d 445 (1989).

In Kisloff, the defendant, a predicate felony offender, pled guilty and was sentenced to felony time for the crime of attempted grand larceny in the third degree, which all parties mistakenly believed was a class E felony rather than a class A misdemeanor. The error was discovered and the defendant was returned before the plea judge who, in an effort to effectuate what had been the intent of the parties, proposed that the defendant plead guilty to grand larceny in the fourth degree, an E felony, which would support the sentence agreed to and previously imposed. When the defendant rejected the proposal and insisted upon being sentenced

in accordance with his misdemeanor plea, the court vacated the plea and set the matter down for trial on the indictment. Thereafter, the defendant commenced an article 78 proceeding seeking to prohibit further prosecution on the felony charges, to have his original plea reinstated and to be resentenced as a misdemeanor offender. The Court of Appeals held that the trial court lacked the inherent power to vacate the plea and sentence over the defendant's objection where the error was more than a mere clerical error on the face of the record and where the proceeding had been terminated by the entry of judgment. The Court held that vacating the misdemeanor plea and requiring the defendant to face the original felony charges contained in the

indictment would be barred by the defendant's constitutional right not to be twice put in jeopardy. The Court then remanded the matter for resentencing the defendant as a misdemeanor offender.

The court finds the People's reliance on Kisloff to be misplaced. In Kisloff, the Court of Appeals simply held that once a sentence is imposed following a guilty plea, the underlying plea could not be disturbed even if the sentence was illegal. In Kisloff, although the parties mistakenly agreed to a disposition where the defendant pled guilty to a class A misdemeanor, the defendant was entitled to be sentence in accordance with that plea. Pursuant to Kisloff, once sentence is imposed upon a defendant, a court may not impose a lengthier sentence unless the

original mistaken sentence resulted form a mere clerical error. Thus, the court finds that the reasoning of Kisloff does not support the People's position that in this case the defendant may be sentenced to additional incarceration.

Summary

The defendant's motion to set aside that portion of his sentence directing him to make a payment of $840,000 to the City of New York through the Department of probation is granted.

The defendant's motion to set aside that portion of his sentence directing the payment of restitution to the ANS in the amount of $196,494.92 or ordering a hearing on the issue of restitution is denied.

The defendant will be resentenced in accordance with CPL 440.20(4). Pursuant to CPL 430.10, additional incarceration will not be imposed.

At resentence, the court will direct the remission of any excess monies paid by the defendant pursuant to CPL 420.30.

This opinion constitutes the decision and order of the court.

Dated: April 8, 1993
New York, New York

RICHARD B. LOWE, III
J.S.C.